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No. 82-1440

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1982

DENNIS EDWIN TILLEY,

Petitioner,

v

CHARLES ANDERSON,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether evidence present at trial on the issue of premeditation and deliberation was constitutionally sufficient.

2. Whether the conduct of the trial court offended federal due process principles.

3. Whether conduct of the trial prosecutor offended federal due process principles.

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OPINIONS BELOW

Respondent accepts Petitioner's Statement of Opinions Below.

JURISDICTION

Respondent accepts Petitioner's Statement of Jurisdiction.

QUESTIONS PRESENTED

1. WHETHER EVIDENCE PRESENT AT TRIAL ON THE ISSUE OF PREMEDITATION AND DELIBERATION WAS CONSTITUTIONALLY SUFFICIENT.

2. WHETHER THE CONDUCT OF THE TRIAL COURT OFFENDED FEDERAL DUE PROCESS PRINCIPLES.

3. WHETHER CONDUCT OF THE TRIAL PROSECUTOR OFFENDED FEDERAL DUE PROCESS PRINCIPLES.

COUNTERSTATEMENT OF FACTS

Petitioner was charged by information with two counts of first degree murder contrary to MCLA 750.316; MSA 28.548. The charges arose out of Petitioner's participation in a double homicide occurring in the early morning hours of November 13, 1973, at a tavern in Southgate, Michigan. Petitioner was tried jointly with co-defendant David Allen Moss. Moss was originally charged with first degree murder but found guilty of two counts of manslaughter.

Evidence at trial established that David Moss met Petitioner at the Nugget Restaurant at approximately 2:30 a.m. on the evening in question. An employee of the establishment, Aron Ormanian, spoke to Moss as the latter arrived. Witness Ormanian testified that Moss stated he was "in a mean mood and looking for trouble".

After a brief conversation with Petitioner, Moss walked over to a table where Paul Mickel, an off duty Wayne County Sheriff's Deputy, was seated with friends. Moss grabbed Mickel by the shoulders and bounced him against the table. After an exchange of words the two proceeded outside closely followed by Petitioner and an employee of the establishment.

Once outside, Moss produced a derringer. Mickel disarmed Moss and drew his own weapon. Mickel then identified himself as a Wayne County Sheriff's Deputy and, while attempting to arrest Moss, placed him spread-eagle against a parked automobile. When Mickel began a frisk search of Moss a restaurant employee appeared and requested official police identification. Mickel produced a Wayne County Sheriff's badge and identification.

As Moss was being placed under arrest Petitioner began taunting Mickel. Witness Delores Gouin testified to hearing Petitioner say "whey don't you shoot me", "just shoot me". Another witness heard Petitioner shout "shoot me pig". Petitioner testified that he heard Mickel identify himself as a police officer and state that Moss was under arrest. He further admitted that he began swearing at Mickel.[1]

Mickel became distracted by Petitioner's conduct. Moss seized upon this opportunity by turning and striking Mickel. A struggle insued and Petitioner obtained Mickel's weapon. Upon seizing the pistol, Petitioner, who held it in both hands, paused a moment before firing three shots into the back-pedalling Mickel. Witnesses testified that Petitioner was between three and ten feet from Mickel when this first volley was fired.

As the wounded Mickel reached the restaurant's vestibule Petitioner ran toward him and fired an additional three point-blank shots. Petitioner then fled throwing the weapon into the parking lot.

Officer Mickel died as a result of multiple gunshot wounds. Three of five bullets entered the front of Mickel's body; two entered his back.

A second victim, Eileen Bowle, was fatally wounded by one of Petitioner's bullets as she stood waiting to enter the restaurant.

Following a six day jury trial, Petitioner was found quilty on both counts.

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[1]

Petitioner testified he knew what he was doing when he became involved. Other witnesses testified that Petitioner was not drunk prior to the incident.

REASONS FOR DENYING THE WRIT

Petitioner contends that insufficient evidence was presented on the element of premeditation and deliberation thereby rendering a valid conviction under Michigan's first degree murder statute impossible.

The standard for determination of claims alleging evidentiary insufficiency was stated with clairity in *Jackson* v *Virginia*, 433 US 307, 318-319; 99 S Ct 2781; 61 L Ed 2d 560 (1979):

> After *Winship* the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must not be simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt". *Woodby* v *Ins*, 385 US at 282; 17 L Ed 2d 362; 87 S Ct 483. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Johnson* v *Louisiana*, 406 US at 362; 32 L Ed 2d 152; 92 S Ct 162.
>
> *Tilley* v *Anderson*, Sixth Circuit No. 81-1782, Order, October 4, 1982, p. 1-2.

Respondent notes that the United States Court of Appeals for the Sixth Circuit, the United States District Court, Eastern District of Michigan, a reporting United States Magistrate, the Michigan Supreme Court, and the Michigan Court of Appeals, all examined the record of Petitioner's trial under

the foregoing standard and concluded that evidence presented was constitutionally sufficient to support a finding of guilt:

> The standard for review of a claim in habeas corpus by a state prisoner that he was convicted on legally insufficient evidence is whether the evidence was such that a rational trier of fact could conclude that petitioner was guilty of the offense or offenses of which the jury convicted him. In this case the petitioner argued in the district court that the evidence of the essential elements of deliberation and premeditation required for conviction of murder in the first degree was insufficient.
>
> This court does not review the evidence to determine whether it would have reached the same verdict as the jury, but only whether the evidence meets the constitutional standard set forth by the Supreme Court in *Jackson* v. *Virginia*, 443 U.S. 307 (1979). Upon review of the record on appeal and after considering the briefs and oral arguments of counsel this court concludes that the evidence of deliberation and premeditation was sufficient to support the jury's verdict.
>
> *Tilley* v *Anderson*, Sixth Circuit No. 81-1782, Order, October 4, 1982, p. 2.

Respondent concurs with the conclusion of said Courts and suggests that additional review by this Honorable Tribunal is not required.

Similarly, Petitioner's allegations respecting allegedly prejudicial conduct by the trial judge and state prosecutor does not require re-examination in this forum. Said claims have been examined by competent tribunals on direct and collateral review under standards enunciated by this Court. [See *Donnelly* v *DeChristoforo*, 416 US 637; 94 S Ct 1868; 40 L Ed

2d 431 (1974)]. In each instance, the reviewing tribunal examined the allegedly improper remarks and found no error, constitutional or otherwise:

> The court also concludes that the trial court did not indicate by its words or actions a bias in favor of the prosecution, though some of its remarks to the counsel for the petitioner indicated impatience and dissatisfaction with the course which the trial took. Further, though the prosecutor made one improper remark in his opening statement in which he characterized the petitioner as a bully, we do not believe that this single error on his part so infected a six-day trial as to render it fundamentally unfair and therefore a violation of due process.
>
> For the foregoing reasons the judgment of the district court is affirmed.
>
> *Tilley* v *Anderson*, Sixth Circuit No. 81-1782, Order, October 4, 1982, p. 3.

Respondent contends that review of Petitioner's claim is inappropriate in light of the foregoing.

RELIEF

WHEREFORE, for all the foregoing reasons, Respondent respectfully requests this Honorable Court deny Petitioner's Application for writ of certiorari.

Respectfully submitted,

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